**AHMAD TAJUDIN ISHAK** *a*

**v.**

**SURUHANJAYA PELABUHAN PULAU PINANG**

COURT OF APPEAL, PULAU PINANG *b*
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: P-02-348-94]
15 AUGUST 1996

*c*

***CIVIL PROCEDURE:*** *Appeal - Admission by Counsel - Whether erroneous admission of law may be withdrawn - Whether Court or Counsel bound by admission made*

***LABOUR LAW:*** *Employment - Unfair discrimination - Whether actionable - Discrimination which is sanctioned by Federal Constitution - Parameters - Federal Constitution, Arts. 5(1) & 8(1)* *d*

***LIMITATION:*** *Public authorities - Continuation of injury or damage - Whether time runs from date of act, neglect or omission is committed or from date of cessation - Public Authorities Protection Act 1948, s. 2(a)* *e*

***PUBLIC AUTHORITIES:*** *Powers - Whether public authority had discriminated against particular class of employees - Whether employees had a right to legitimate expectation - Principles applicable*

The appellant, on behalf of himself and 53 other security assistants (collectively referred to as 'the appellant'), brought an action against the respondent ('the employer') for discrimination on the grounds that: (i) the appellant was only conferred auxiliary police constable powers while 46 other security assistants ('the 46') in the same salary scale were given auxiliary police sergeant powers; and (ii) the appellant was paid lower special and housing allowances than the 46. At the hearing, Counsel for both sides agreed that it was within the right of the employer to discriminate among his employees and, in the absence of an Act of Parliament stating otherwise, unfair discrimination was not actionable. The trial Judge agreed and found for the employer. *f* *g*

The appellant appealed. The issues that arose in this appeal were: (i) whether the appellant's action was time-barred pursuant to the Public Authorities Protection Act 1948 ('the Act') since the 46 were given auxiliary police sergeant powers on 11 May 1985 and the action was filed on 10 November 1992; (ii) whether Counsel for the appellant could retract the erroneous admission of law he had made before the trial Judge that discrimination was *h* *i*

not actionable; and (iii) whether the employer had discriminated against the appellant. Counsel for the appellant also argued that his client had a legitimate expectation of being conferred the powers of auxiliary police sergeants and being paid the same allowances as the 46.

**Held:**

**Per Abdul Malek Ahmad JCA:**

**[1]** Section 2(a) of the Act provides, *inter alia*, that no suit or action shall lie against a public authority unless it is instituted within 36 months of the act, neglect or default complained of or in the case of a continuance of injury or damage, within 36 months after the ceasing thereof. As the act, neglect or default complained of by the appellant, i.e. the disparity in auxiliary police powers and allowances, was still continuing, limitation would only run 36 months after the ceasing thereof, which is yet to take place. In consequence, the employer's plea of limitation must fail.

**[2]** In view of the provisions of Arts. 5(1) and 8(1) of the Federal Constitution, Counsel and the trial Judge were quite wrong in holding the view that discrimination was not actionable. The combined effect of these two Articles is to strike down any arbitrary and unfair action which adversely affects the quality of life. Where a person's livelihood or reputation is adversely affected by a decision, the decision-maker must act fairly and reasonably.

**[3]** However, this is subject to the limitations that: (i) any discrimination that it sanctioned by the Federal Constitution is beyond challenge; (ii) the remedy for discrimination differs in public law and private law; and (iii) unfair discrimination in public law proceedings may be justified in the public interest or national security. Article 8 envisages that there may be lawful discrimination based on classification which is founded on *intelligible differentia* which distinguishes one group from another and the *differentia* must have a rational relation to the object sought to be achieved.

**[4]** It is well settled that Counsel is not bound by an erroneous admission of law that he makes. Neither is the Court. Counsel may withdraw the erroneous admission of law at any time, even on appeal. If a Judge acts upon an erroneous admission of law an appeal court is not bound by his views and may look at the matter afresh. Counsel could therefore withdraw the admission.

**[5]** For unfair discrimination to be actionable, there must be: (i) some form of discrimination; (ii) the discrimination must be unfair; and (iii) there must be resultant harm or injury. On the facts of this case, there had been no

discrimination against the appellant. The employer had acted fairly by inviting all security assistants to apply for the higher auxiliary rank of police sergeant but the appellant chose not to do so. Also, the special allowance given to the 46 was not part of the security assistants' salary scheme but provided for under s. 49A of the Police Act 1967, while the number and category to be conferred with a particular police rank was the decision of the Inspector-General of Police or Commanding Officer under the Police Act 1967, and not that of the employer.

**[6]** A legitimate expectation may arise where a claimant has: (i) a substantive right which cannot be denied him; (ii) an interest which the law protects and cannot properly be withdrawn without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision; (iii) a legitimate expectation that a public body will act fairly towards him; and (iv) an expectation that a particular procedure must be followed based on a specific promise or established practice. In this case, there was no basis for the appellant to have any legitimate expectation because the employer had never acted unfairly or inconsistently towards its security assistants or denied them any opportunity but had in fact invited all of them to apply for the higher auxiliary police rank. Since that was the first time it had taken place, the question of the existence of a regular practice had yet to arise.

*[Appeal dismissed.]*

*[**Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:*** *Rayuan - Pengakuan oleh Peguam - Samada kesilapan pengakuan undang-undang boleh ditarik-balik - Samada Mahkamah atau Peguam terikat oleh pengakuan yang dibuat*

***UNDANG-UNDANG BURUH:*** *Pekerjaan - Diskriminasi tidak adil - Samada boleh diambil tindakan - Diskriminasi yang direstui oleh Perlembagaan Persekutuan - Parameter - Perlembagaan Persekutuan Per. 5(1) & 8(1)*

***PENGHADAN:*** *Pihak-pihak Berkuasa Awam - Penerusan kecederaan atau kerosakan - Samada masa bermula daripada tarikh perbuatan, kecuaian atau peninggalan dilakukan atau daripada tarikh pemberhentian - Akta Perlindungan Pihak Berkuasa Awam 1948 s. 2(a)*

***PIHAK-PIHAK BERKUASA AWAM:*** *Kuasa-kuasa - Samada pihak berkuasa awam telah melakukan diskriminasi terhadap segelintir kedudukan pekerja - Samada pekerja-pekerja mempunyai hak kepada harapan sah - Prinsip-prinsip yang terpakai*

Perayu, bagi pihak dirinya sendiri dan 53 pembantu-pembantu kawalan yang lain (yang dirujuk secara kolektifnya sebagai 'perayu'), telah memulakan satu tindakan terhadap responden ('Majikan') kerana perbuatan diskriminasi atas alasan bahawa (i) perayu telah hanya diberikan kuasa-kuasa polis konstabel tambahan sedangkan 46 pembantu-pembantu kawalan yang lain ('46 orang tersebut') dalam tanggagaji yang sama telah diberikan kuasa-kuasa polis sarjan tambahan; dan (ii) perayu telah di bayar elaun perumahan dan elaun khas yang lebih rendah daripada 46 orang tersebut. Diperbicaraan, Peguam bagi kedua-dua pihak bersetuju bahawa ianya merupakan hak majikan untuk melakukan diskriminasi di kalangan pekerja-pekerjanya dan, dalam ketiadaan Akta Parlimen yang menyatakan sebaliknya, diskriminasi yang tidak adil tidak dapat diambil tindakan. Hakim perbicaraan telah bersetuju dan membuat keputusan yang memihak kepada majikan.

Perayu telah merayu. Isu-isu yang berbangkit dalam rayuan ini adalah: (i) samada tindakan perayu dihalang oleh masa selaras dengan Akta Pihak-Pihak Berkuasa Awam 1948 ('Akta') oleh kerana 46 orang tersebut telah diberikan kuasa-kuasa polis sarjan pada 11 Mei 1985 dan tindakan tersebut telah difailkan pada 10 November 1992; (ii) sama ada Peguam bagi pihak perayu boleh menarik-balik pengakuan undang-undang yang telah beliau lakukan di hadapan Hakim perbicaraan bahawa diskriminasi tidak boleh diambil tindakan; dan (iii) sama ada majikan telah melakukan diskriminasi terhadap perayu. Peguam bagi pihak perayu juga berhujah bahawa anakguamnya mempunyai pengharapan yang sah untuk diberikan kuasa-kuasa polis sarjan tambahan dan diberi elaun-elaun yang sama seperti 46 orang tersebut.

**Diputuskan:**
**Oleh Abdul Malek Ahmad HMR:**

**[1]** Seksyen 2(a) Akta memperuntukan, antara lainnya, bahawa mana-mana guaman atau tindakan tidak akan boleh diambil terhadap sesuatu pihak berkuasa awam kecuali ianya dimulakan dalam tempoh 36 bulan daripada perbuatan, kecuaian atau kemungkiran yang diadukan itu atau dalam kes kecederaan atau kerosakan yang berterusan, hendaklah diambil dalam tempoh 36 bulan selepas ianya berhenti. Oleh kerana perbuatan, kecuaian atau kemungkiran yang diadukan oleh perayu, iaitu perbezaan dalam kuasa-kuasa polis tambahan dan elaun, masih berterusan, penghadan akan hanya berlanjutan sehingga 36 bulan sahaja selepas pemberhentiannya, yang mana masih belum berlaku. Akibatnya, rayuan penghadan majikan tentu sekali gagal.

**[2]** Memandangkan peruntukan-peruntukan Per. 5(1) dan 8(1) Perlembagaan Persekutuan, Peguam dan Hakim perbicaraan adalah agak salah dalam mencapai pandangan bahawa diskriminasi tidak boleh diambil tindakan.

Kesan bersama kedua-dua Perkara ini adalah untuk menolak sebarang tindakan yang arbitrari dan tidak adil yang mana secara bertentangannya menjejaskan mutu hidup. Di mana mata pencarian atau reputasi seseorang secara bertentangannya terjejas oleh sesuatu keputusan, pembuat keputusan itu mestilah bertindak dengan adil dan wajar.

**[3]** Walaubagaimanapun, ini adalah tertakluk kepada penghadan bahawa :(i) mana-mana diskriminasi yang disetujui oleh Perlembagaan Persekutuan tidak boleh dicabar; (ii) remedi untuk diskriminasi berbeza dalam undang-undang awam dan undang-undang persendirian; dan (iii) diskriminasi tidak adil dalam prosiding undang-undang umum boleh dijustifikasikan demi kepentingan awam atau keselamatan negara. Perkara 8 membayangkan bahawa mungkin terdapat diskriminasi yang sah berdasarkan klasifikasi yang diasaskan pada *"intelligible differentia"* yang mana membezakan sesuatu kumpulan dengan yang lain dan perbezaan itu mestilah mempunyai perhubungan rasional dengan objek yang hendak dicapai.

**[4]** Ianya jelas bahawa Peguam tidak terikat oleh suatu pengakuan undang-undang yang silap yang dibuat olehnya. Begitu juga dengan Mahkamah. Peguam boleh menarik balik pengakuan undang-undang yang silap itu pada bila-bila masa pun, walaupun diperingkat rayuan. Jika seseorang Hakim bertindak atas satu pengakuan undang-undang yang silap, sesebuah Mahkamah rayuan tidak terikat oleh pendapat-pendapatnya dan boleh memberikan perhatian kepada perkara itu semula. Peguam dengan itu boleh menarik balik pengakuan tersebut.

**[5]** Bagi mengambil tindakan terhadap diskriminasi yang tidak adil, haruslah terdapat: (i) sesuatu diskriminasi; (ii) diskriminasi itu mestilah tidak adil; dan (iii) haruslah mengakibatkan kecederaan atau kerosakan. Menurut fakta-fakta kes ini, tidak berlaku diskriminasi terhadap perayu. Majikan telah bertindak secara adil dengan mempelawa kesemua pembantu kawalan untuk memohon bagi pangkat sarjan polis tambahan yang lebih tinggi tetapi perayu tidak mahu berbuat sedemikian. Dan juga elaun khas yang diberikan kepada 46 orang tersebut bukanya merupakan sebahagian daripada sekim tanggagaji pembantu-pembantu kawalan tetapi diperuntukkan di bawah s. 49A Akta Polis 1967 sedangkan nombor dan kategori untuk diberikan pangkat polis yang khusus adalah keputusan Ketua Inspektor Polis atau Pegawai Memerintah di bawah Akta Polis 1967 dan bukannya merupakan budibicara majikan.

**[6]** Sesuatu pengharapan yang sah mungkin berbangkit di mana seseorang penuntut mempunyai: (i) suatu hak substantif yang tidak boleh dinafikan kepadanya; (ii) suatu kepentingan yang dilindungi oleh undang-undang dan

tidak boleh dengan sewajarnya ditarik-balik tanpa pihak menuntut diberikan peluang untuk membuat ulasan dan tanpa pihak berkuasa memberikan alasan-alasan yang rasional bagi apa-apa keputusan yang bertentangan; (iii) suatu pengharapan yang sah bahawa sesebuah pertubuhan awam akan bertindak dengan adilnya terhadap beliau; dan (iv) suatu pengharapan bahawa suatu prosedur yang khusus haruslah dipatuhi berdasarkan janji yang spesifik atau amalan yang telah lama ditetapkan. Dalam kes ini, tidak terdapat apa-apa asas untuk perayu mempunyai apa-apa pengharapan sah kerana majikan telah tidak pernah bertindak secara tidak adil atau dengan cara yang tak konsisten terhadap pembantu-pembatu kawalannya mahupun tidak memberikan mereka apa-apa peluang tetapi pada hakikatnya telah mempelawa mereka kesemuanya untuk memohon bagi mendapatkan pangkat polis tambahan yang lebih tinggi. Oleh kerana itulah pertama kalinya perkara tersebut telah berlaku, persoalan kewujudan amalan biasa masih belum berbangkit.

*[Rayuan ditolak.]*

**Cases referred to:**

*Mohd Azam Shuja & Ors. v. United Malayan Banking Corp. [1995] 2 MLJ 2175* ***(refd)***

*Gulwant Singh v Abdul Khalik [1965] 2 MLJ 55* ***(refd)***

*Letchumi & Anor. v. Asia Insurance Co. [1972] 2 MLJ 105* ***(refd)***

*Connecticut Fire Insurance Co. v Kavanagh [1892] AC 473* ***(refd)***

*Tan Tek Seng v. Suruhanjaya Pendidikan & Anor. [1996] 2 CLJ 771* ***(foll)***

*Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665* ***(foll)***

*Che Esah & Anor v. Che Limah [1996] 1 MLJ 36* ***(foll)***

*Yap Cheng Kee & Anor. v. Ow Giam Eng [1996] 1 MLJ 36* ***(foll)***

*PP v. Khong Teng Khen & Anor. [1996] 2 MLJ 166* ***(foll)***

*Government of Malaysia v. V.R. Menon [1990] 1 MLJ 277* ***(foll)***

*State of Mysore v. Krishna Murthy AIR [1973] SC 1146* ***(foll)***

*R v. Devon CC, ex p Baker [1995] 1 All ER 73* ***(foll)***

*All India Sainik Schools Employees' Association v. Defence Minister cum Chairman, Board of Governors, Sainik School Society, New Delhi & Ors. AIR [1989] SC 88* ***(foll)***

*Indian Oil Corp. v. Premier Road Carriers Ltd. AIR [1983] Cal. 445* ***(foll)***

*Dost Mohammad v. Union of India AIR [1981] Lab. IC 1210* ***(foll)***

*Ranbir Singh v. Chief Commercial Superintendent AIR [1961] Punj. 258* ***(foll)***

**Legislation referred to:**

Federal Constitution, Arts. 5(1), 8(1)

Police Act 1967, s. 49A

Pensions Adjustment Act 1980, s. 1(2)
Public Authorities Protection Act 1948, s. 2(a)
Rules of the Court of Appeal 1994, r. 18

**Other source referred to:**
*Basu's Commentary on the Constitution of India*, Basu, Vol. B, p. 142

*[Appeal from High Court Malaya, Pulau Pinang; Originating Summons No. 24-951-92]*

*For the appellants - P. Navaratham (M.M. Athimulan with him); M/s. Nava & Assoc.*
*For the respondents - Zarina Hussain (Ramsun Ho Chin Huey with him); M/s. Lim Huck Aik & Co.*

## JUDGMENT

**Abdul Malek Ahmad JCA:**

At the hearing of the appeal before us, we were confronted with three main issues. The first concerned the question of limitation which, if we agreed with the views of learned Counsel for the respondent, would eliminate the necessity of dealing with the other two problems.

The second was as regards the proper juridical basis on which a point of law ought to be admitted because the parties had proceeded in the Court below upon an erroneous admission of the law which did not bind us. The third was the subject matter of the appeal itself namely whether the respondent had acted indiscriminately towards Ahmad Tajudin bin Haji Ishak, on behalf of himself and for 53 others holding the post of security assistants time scale, salary scale grade C-11 and conferred the powers of auxiliary police constables (who for the purposes of this judgment shall hereinafter be collectively referred to as 'the appellant').

By an originating summons dated 10 November 1992, the appellant had asked:

(a) for a declaration that the respondent had acted indiscriminately towards the appellant as regards the salary scale grade C-11 for the security assistants conferred with the powers of auxiliary police constables;

(b) for a declaration that the appellant had the right to be conferred the powers of auxiliary police sergeants effective from l May 1982;

(c) a consequential order directing the respondent to cease acting indiscriminately for the particular salary scale and that the appellant be given the same standing as the auxiliary police sergeants and

enjoy the benefits enjoyed by other, security assistants in salary scale grade C-11 who had been conferred the powers of auxiliary police sergeants;

(d) a consequential order directing the respondent to pay the appellant a special allowance payable to security assistants in salary scale C-11 conferred the powers of auxiliary police sergeants at RM40 a month effective from 1 May 1982 or from a date fixed by the Court;

(e) a consequential order directing the respondent to pay the appellant the difference of RM53 a month from l September 1991 which is the difference of the housing rent allowance of RM138 a month payable to security assistants in salary scale grade C-11 conferred the powers of auxiliary police sergeants as compared to the allowance of RM85 a month for the same category paid to the appellant;

(f) costs;

(g) interest; and

(h) any other order or relief deemed fit and appropriate by the Court.

It must be mentioned here that the relevant effective date should have been 11 May 1982 and not l May 1992 as wrongly stated in the originating summons.

We shall start by examining whether the matter is time-barred in the first place as pointed out by learned Counsel for the respondent. According to learned Counsel for the appellant, there had been negotiations between the parties in this action since 1982 the result of which only came to their knowledge on 5 September 1990 which, in his view, would be the relevant date time would begin to run for limitation purposes.

Learned Counsel for the respondent, however, contend that the time would begin on 11 May 1982 for the following reasons:

a) that was the date the other 46 security assistants were conferred the powers of auxiliary police sergeants;

b) there was never any negotiations between the parties as a alleged and therefore no promise by the respondent to negotiate on the conferment of the powers of auxiliary police sergeants citing the cases of *Ng Moh v. Tan Bok Kim & Anor.* [1969] 1 MLJ 46 and *Nasri v. Mesah* [1971] 1 MLJ 32 as cases on point;

c) the respondent's letter dated 5 September 1990 was only in relation to special allowances;

and accordingly in view of the 36-month period stated in s. 2(a) of the Public Authorities Protection Act 1948 (hereinafter 'the Act'), the appellant's cause of action against the respondent would have lapsed on 10 May 1985. Since the matter was filed only on 10 November 1992, she submitted that the appellant was well out of time.

The appellant insists that after their colleagues were conferred the higher auxiliary police rank, their union had made representations to the Public Services Department who by letter dated 8 October 1983 informed the union that the respondent had been directed to comply with all the terms and conditions relating to promotions.

The appellant had sent a memorandum of their claim to the respondent copied to the Public Services Department on 17 March 1986. By letter dated 29 May 1986, the Public Services Department had written to the respondent stating that as regards the issue of police ranking and the allotment of different duties among the security assistants, that is the management problem of the respondent. They were of the view that personnel in the same salary scale ought to be given similar duties on the principle of "rate for the job". They had proposed a meeting with the Ministry of Transport to reach a solution.

On 16 September 1987, the respondent wrote to the union saying that the position, promotional aspects and salary of a security assistant either with the rank of auxiliary police sergeant or auxiliary police constable were the same based on salary scale grade C-11 and the difference only existed from the aspect of auxiliary police powers to ensure the smooth administration and operation of the respondent's security force.

The issue remained unresolved until the respondent decided by letter dated 11 August 1990 to pay the 46 auxiliary police sergeants a special allowance of RM40 which was backdated to their appointment date on 11 May 1982. The respondent also decided to pay all security assistants a housing allowance with effect from the l September 1991 but the appellant got RM85 while the 46 others were paid RM138 although the categories were on the same salary scale grade C-11.

Although the respondent had informed the appellant that their decision was final by letter dated 5 September 1990, the appellant had filed these proceedings by originating motion on 10 November 1992. As stated earlier, the appellant maintains that time should only begin to run 5 September 1990 and they are not, therefore, out of time.

Section 2(a) of the Act reads:

> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

Despite the submissions of both learned Counsel for the appellant and learned Counsel for the respondent on this point, we were more inclined to hold that the act, neglect or default complained of is a continuing one as the appellant are still in the same position they were in when their 46 colleagues were conferred the powers of auxiliary police sergeants, in which case limitation would run only 36 months after the ceasing of the act, neglect or default complained of, which is yet to take place. In the consequence, the plea of limitation must fail.

We move now to the second issue. At the start of submissions, we were under the impression that learned Counsel for the appellant was raising a new point not raised in the Court below and learned Counsel for the respondent had no objections. We were inclined to allow it in view of r. 18 of the Rules of the Court of Appeal 1994 and several case authorities namely *Mohd Azam Shuja & 4 Ors. v. United Malayan Banking Corporation Bhd.* [1995] 2 MLJ 2175, *Gulwant Singh v. Abdul Khalik* [1965] 2 MLJ 55, *Letchumi & Anor. v. The Asia Insurance Co. Ltd.* [1972] 2 MLJ 105, *Conneticut Fire Insurance Company v. Kavanagh* [1892] AC 473 and *Tan Tek Seng v. Suruhanjaya Pendidikan & Anor.* [1996] 1 MLJ 261. As the submissions continued, however, we discovered that the parties had actually proceeded in the trial Court upon an erroneous admission of the law which did not bind us.

In the Court below, Counsel for both sides stood on common ground upon the issue of discrimination. They were agreed that it was within the right of the respondent as an employer to discriminate among his employees. They were also agreed that, in the absence of an Act of Parliament in that behalf, unfair discrimination whether on the basis of sex or other criteria was not actionable. The trial Judge held the same view. Indeed, he said so in no uncertain terms in his judgment.

Counsel and the Judge were quite wrong, of course. They all overlooked the far-reaching provisions of Arts. 5(1) and 8(1) of the Federal Constitution. The combined effect of these two Articles is to strike down any arbitrary or harsh and unfair action which adversely affects the quality of life. See. *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor.* [1996] 1 MLJ 261 and *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan and Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481. It follows that where a person's livelihood or reputation is adversely affected by a decision, then the decision-maker must act fairly and reasonably.

Before us, Counsel for the appellant said that he realised the error into which he had fallen in the Court below. He wished to retract the admission of law he had made before the Judge. Cik Zarina Hussain, who appeared for the respondent, was absolutely fair in her approach to this change of stance by the appellant. She conceded that it was open the appellant to take the point.

Now, it is well-settled that Counsel is not bound by an erroneous admission of law that he makes. Neither is the Court. If Counsel makes an erroneous admission of law, he may withdraw it at any time; even on appeal. If a Judge acts upon an erroneous admission of law, this Court is not bound by his views. We may look at the matter afresh. There are several authorities in support of the view that we take of the matter but we find it quite sufficient to quote from just two of them.

The first is *Che Esah & Anor. v. Che Limah* [1996] 1 MLJ 36, 37 where Barakbah CJ (Malaya) said:

> There is one other matter which should be mentioned on the question as to whether the proper application is by way of motion for the withdrawal of the admission by the defendants' Counsel or can be made orally. The answer could be found in the case of *The State of Perak v. P.R.A.L.M.N. Muthukaruppan Chettiar* [1938] MLJ 247 at p. 256. McElwaine CJ (SS) stated *inter alia*:
>
> > In *P.M.N.T. Ramasamy Chetty v. Syed Alsagoff*, 7 FMSLR 93, Thorne J at p. 120 said:
> >
> > > Counsel for the respondent at the hearing below conceded that the respondent was the representative in interest of her own nominees, namely, the persons named in the transfers to the appellants as transferors. In the Court of Appeal Counsel submitted that there was an erroneous view of the law and that the respondent could be heard to say, notwithstanding this statement or admission, that it was erroneous. I incline to the opinion that this submission is correct. It seems to me that the statement of Counsel below amounted to no more than that his opinion on the facts proved was that the respondent was

the representative in interest of his own nominees and that he did not propose to argue that they were not. I think that the respondents are now at liberty to urge that this opinion was incorrect.

This passage which gives fuller reasons than Farrer-Manby J gave at p. 115 for allowing the withdrawal appears to me exactly in point. The admission of Counsel below appears to have been erroneous in law. But I would go further and say that as an admission it differs from ordinary admissions which may be said to be evidence of matters of which the Court had not full knowledge such as the admission in *Hallen v. Worman* 3 LT (NS) 741 and *Urquhart v. Butterfield* 37 Ch. D. 357. In this case Counsel's admission introduced no new evidence. Had he stated that further enquiry had satisfied the Commissioner of Estate Duty that the property was a joint-family property, it would have been very different.

He gave his own opinion of the facts proved. 'The last witness has altered my view.' There was no reason why the last witness should have altered the views of the Judge on the evidence before him. The admission was accepted by the Judge and forms the basis of this part of his judgment.

In my opinion this Court should disregard the admission on the grounds that it was an erroneous statement of law no more binding or authoritative than many other bizarre propositions of law to which Courts have to listen.

I therefore hold that an applications for withdrawal of admission on the ground that it was an erroneous statement of law could be made to the Court orally.

The second is *Yap Cheng Kee & Anor. v. Ow Giam Eng & Anor.* [1977] 1 MLJ 177 where at p. 178 Ali, Ag. LP said:

As appears from the learned Magistrate's grounds of decision, he was of the view that Counsel agreed the appellants father was a statutory tenant and confined himself to the question whether the children of a statutory tenant were entitled to the tenancy after his death. It is unarguable that a statutory tenant has a purely right. But was the deceased a statutory tenant? This can be decided here even if Counsel had made an erroneous admission. I would quote a passage from *Naharani Beni Pershad Koeri v. Dudh Nath Roy et. al.* [1899] LR 26 I.A. 216, 221:

In the opinion of their Lordships this admission if correctly understood, was erroneous in point of law, and does not preclude the Counsel for the appellant on this appeal from claiming his client's legal rights.

Based on these authorities, we are satisfied that it is open to Counsel to now withdraw the admission made in the Court below and to argue, as a proposition of law, that unfair discrimination is an actionable wrong under our law.

Article 8(1) of the Federal Constitution states that all persons are equal before the law and entitled to the equal protection of the law. Learned Counsel for the appellant maintains that his clients had a legitimate expectation that they would be given the powers of auxiliary police sergeants and would be paid the same allowances as their 46 colleagues. He had cited *Basu's* '*Commentary on the Constitution of India*' Vol. B on Art. 14 at p. 142 which states that even where a person claiming some benefit or privilege has no legal right to it in private law, he may have a legitimate expectation of receiving the benefit or privilege as a matter of public law in which case the Courts will insist on a fair procedure. Of course, in order to constitute such legitimate expectation it must have a reasonable basis, for example, a statement of undertaking or any act on the part of the public authority which would make it unfair or inconsistent with good administration to deny such opportunity or the existence of a regular practice which the claimant can reasonably expect to continue.

He had argued that the relevant Article is an injunction to both the legislative and executive organs of the State and other subordinate authorities not to deny to any person equality before the law or the equal protection of the law. Article 8(2) of the Federal Constitution also provides that there shall be no discrimination against citizens in the appointment to any office or employment under a public authority which according to learned Counsel would encompass all stages of service from initial appointment to termination including promotion, fixation of seniority, termination gratuity and the like.

The intent of the Article denotes that all employees shall be treated alike under like circumstances both in privileges and obligations and it must be ensured that there is equality among equals and that persons similarly placed are not discriminated and denied of equal treatment. Here, the respondent's action in conferring the powers of auxiliary police sergeants on only 46 of the security assistants was to the appellant an act which was discriminatory violative of the principles of natural justice, unfair, arbitrary and amounted to a denial of fair opportunities.

But, on the facts of this case, has there been unfair treatment among the security assistants working for the respondents? All of them were in the same salary scale grade C-11 and each and everyone received the same amount of take-home pay at the end of each month. They were initially all conferred with the same auxiliary police rank namely as auxiliary police constables. They were all given the same opportunity to apply for the post of auxiliary police

sergeants which is not and cannot be denied by the appellant who had all acknowledged receipt. However, the appellant chose not to apply. Can they now argue that they had been deprived of the opportunity?

The only difference between the appellant and the 46 security assistants conferred the rank of auxiliary police sergeants is as regards the subsequent addition of special allowances which is not part of the salary scheme for security assistants. Section 49A of the Police Act 1967 provides that an auxiliary police officer shall serve voluntarily and shall not be entitled to any remuneration for such service save for such allowances as may be prescribed by the Minister from time to time in relation to specific duties. In effect, the special allowances are given as a reward for the additional duties.

A security assistant in salary scale grade C-11 is eligible for promotion to salary scale grades C-3 and C-1 through examinations which has nothing to do with the conferment of auxiliary police powers and rank. Further, the number of security assistants working with the respondent who are to be conferred the powers of auxiliary police sergeants has to be limited for practical reasons in order to create an effective chain of command within the respondent's security force. Also, the number approved on the facts of this case which was 46 was the decision of the Inspector-General of Police by letter dated 13 February 1981 and not that of the respondent.

It has been decided in *PP v. Khong Teng Khen & Anor.* [1976] 2 MLJ 166 that the principle underlying Art. 8 of the Federal Constitution is that the law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons for the purpose of legislation. It was also held that all that Art. 8 guarantees is that a person in one class should be treated the same as another person in the same class.

In *Government of Malaysia v. V.R. Menon* [1990] 1 MLJ 277, the respondent was a pensioner receiving pension from the Malaysian Government although he is an Indian citizen residing in Madras, India. Foreign resident pensioners were excluded by s. 1(2) of the Pensions Adjustment Act 1980 from receiving additional benefits. He was successful in his action in the Court below where the trial Judge held that the restriction imposed by the said section was void and of no effect.

On appeal to the Supreme Court, a five-member panel ruled that there can be no doubt that the said provision was discriminatory against foreign resident pensioners but the classification between foreign and local resident pensioners is founded on an intelligible differentia and has a national nexus with the object

to be achieved by the Act which is to ameliorate the financial position of pensioners in Malaysia due to the depreciating value of the Ringgit and the rise in the cost of living in this country. They added that the residential qualification imposed constitutes a permissible discrimination and therefore did not violate the equality provision of Art. 8(1) of the Federal Constitution.

The brief note in *State of Mysore v. Krishna Murthy* AIR [1973] SC 1146 states:

> Inequality of opportunity of promotion, though not unconstitutional *per se*, must be justified on the strength of rational criteria correlated to the object for which the difference is made. In the case of Government servants, the object of such a difference must be presumed to be a selection of the most competent from amongst those possessing qualifications and backgrounds entitling them to be considered as members of one class. In some cases, quotas may have to be fixed between what are different classes or sources for promotion on grounds of public policy. If, on the facts of particular case, the classes to be considered are really different, inequality of opportunity in promotional chances may be justifiable. On the contrary, if the facts of a particular case disclose no such rational distinction between members of what is found to be really a single class no class distinctions can be made in selecting the best. Articles 14 and 16(1) of the Constitution must be held to be violated when members of one class are not even considered for promotion. In the latter type of cases where the difference in promotional opportunities of those who were wrongly divided into two classes for this purpose only could not be justified on any rational grounds.

As for the legitimate expectation point, it is appropriate at this point to reproduce the speed of Simon Brown LJ in *R v. Devon CC ex p. Baker* [1995] 1 All ER 73 where at pp. 88 and 89 he had said:

> It is first, I think, convenient to identify, at least in broad categories, various of the distinct senses in which the phrase 'legitimate expectant' is nowadays used.
>
> Sometimes the phrase is used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him. It was used in this sense and the assertion upheld in cases such as *R v. Secretary of State for the Home for the Home Department, ex p Ruddock* [1987] 2 All ER 518; [1987] 1 WLR 1482. It was used in the same sense but unsuccessfully in, for instance, *R v. Board of Inland Revenue, ex p MFK Underwriting Agencies Ltd.* [1990] 1 All ER 91; [1990] 1 WLR 158 and *R v. Jockey Club, ex p Ram Racecourses Ltd.* [1990] [1993] 2 All ER 225. The various authorities show that the claimant's right will only be found established when this a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator other public body will be held bound in fairness by the representation made unless only its promise or underrating as to how its power would be exercised is inconstant with the statutory duties imposed upon it. The doctrine employed in this sense is akin to an estoppel. In so far as the public body's representation is communicated by

way of a stated policy, this type of legitimate expectation falls into two distinct sub-categories: cases in which the authority are held entitled to change their policy even so as to affect the claimant, and those in which they are not. An illustration of the former is *R v. Torbay BC, ex p Cleasby* [1991] COD 142; of the latter, *Ex p Khan.*

Perhaps conventionally the concept of legitimate expectation is used to refer to the claimant's interest in some ultimate benefit which he hopes to retain (or, some would argue, attain). Here, therefore, it is the interest itself rather than the benefit that is the substance of the expectation. In other words the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being give an opportunity to comment and without the authority communicating rational grounds for any adverse decision. Of the various authorities drawn to our attention, *Schmidt v. Secretary of State for Home Affairs* [1969] 1 All ER 904; [1969] 2 Ch. 149, *O'Reilly v. Mackman* [1982] 3 All ER 1124; [1983] 2 AC 237 and the recent decision of Roch J in *R v. Rochdale Metropolitan BC, ex p Schemet* [1992] 1 FCR 306 are clear examples of this head of legitimate expectation.

Frequently, however, the concept of legitimate expectation is used to refer to the fair procedure itself. In other words it is contended that the claimant has a legitimate expectation that the public body will act fairly towards him. As was pointed out by Dawson J in *A-G for New South Wales v. Quli* [1990] 93 ALR 1 39 this use of the term is superfluous and unhelpful: it confuses the interest which is the basis of the requirement of procedural fairness with the requirement itself:

> No doubt people expect fairness in their dealings with those who make decisions affecting their interests, but it is to my mind quite artificial to say that this is the reason why, if the expectation is legitimate in the sense of well-founded, the law imposes a duty to observe procedural fairness. Such a duty arises, if at all, because the circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted.

The final category of legitimate expectation encompasses those cases in which it is held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness requires that the public authority he held to it. The authority is bound by its assurance, whether expressly given by way of a promise or implied by way of established practice. *Re Liverpool Taxi Owners' Association* [1972] 2 All ER 589; [1972] 2 QB 299 and *A-G of Hong Kong v. Ng Yuen Shiu* [1983] 2 All ER 346; [1983] 2 AC 629 are illustrations of the Court giving effect to legitimate expectations based upon express promises; *Council of Civil Service*

> *Unions v. Minister for the Civil Service* is an illustration of a legitimate expectation founded upon practice albeit one denied on the facts by virtue of the national security implications.
>
> Let me acknowledge at once that the above is by no means an exhaustive analysis of the concept of legitimate expectation; anyone interested in that should study instead Mr. Paul Craig's illuminating article *'Legitimate expectations: A Conceptual Analysis*' [1992] 108 LQR 79, rather it is an attempt at a broad categorisation which may, I hope, clear away some at least of the many semantic confusions that have be devilled this area of our law.

In our case, there is really no basis for the appellant to have this legitimate expectation because the respondent had never acted unfairly or inconsistently towards their security assistants or denied them any opportunity but had in fact written to all of them to apply for the higher auxiliary police rank. Since this was the first time this has taken place, the question of the existence of a regular practice has yet to arise.

Having carefully considered the submissions, we could only conclude that the relevant Article envisages that they may be lawful discrimination based on classification which is founded on intelligible differentia which distinguishes persons or things that are grouped together from others left out in the group and that the differentia must have a rational relation to the object sought to be achieved by the statute in question. In the circumstances of this case, our view was that there had been no breach of Art. 8 of the Federal Constitution.

Having said that, we now turn to the third point as to whether there had been discrimination exercised by the respondent in the conferment of the auxiliary police rank. One could argue that the finding of no breach of Art. 8 of the Federal Constitution would render this question purely rhetorical.

As presently advised, we are unaware of any decision of our Courts where it has been expressly held that unfair discrimination is actionable. Counsel have not cited any Malaysian authority on the point. We are therefore constrained to treat this appeal as a case of first impression. It therefore becomes necessary to determine the ingredients of the wrong in question as well as its parameters. In carrying out this task, we are aided by authorities decided by the Courts of India where the constitutional provisions are, in substance, similar to our own.

In our judgment, for unfair discrimination to be actionable, the following elements must be proved to exist:

(a) there must be some form of discrimination;

(b) the discrimination must be unfair; and

(c) there must be resultant harm or Injury.

Taking the first ingredient, a plaintiff, in order to succeed in an action for unfair discrimination, must establish that discrimination was practised upon him. Generally speaking, discrimination usually occurs when equals are treated unequally or when unequals are treated equally. See, *All India Sainik Schools Employees Association v. The Defence Minister-cum-Chairman, Board of Governors, Sainik School Society, New Delhi and Others* AIR [1989] SC 88, 92. However, it all depends upon the facts of a given case. It is the conduct of the defendant towards the particular plaintiff that calls for attention and not particular acts or omissions. But this statement must not be taken too far. For, cases may occur where a single act or omission on the part of the defendant may have a continuing discriminatory effect upon the plaintiff. Take the case of promotions in the sphere of employment. If a plaintiff's promotion is withheld while another who is similarly circumstanced is promoted, it is but one act, or more appropriately, one omission. Nevertheless, it has a discriminatory effect upon the plaintiff. Whether discrimination was practised in a particular case is a question of fact depending upon the facts and circumstances of the given case. See, *Indian Oil Corporation Ltd. v. Premier Road Carriers Ltd*. AIR [1983] Cal. 445.

Discrimination *per se* is not actionable unless it is also unfair, and this brings us to the second ingredient. To be actionable, discrimination must be accompanied by an element of harshness or unfairness. In other words, there must be unjust or unreasonable or unfair bias in favour of one and against another. See, *Dost Mohammad v. Union of India* [1981] Lab. IC 1210; *Ranbir Singh v. Chief Commercial Superintendent* AIR [1961] Punj. 258. Generally speaking, there must be a rational nexus between the conduct complained of as amounting to discrimination and the object that is sought to be achieved by it. That nexus may be based on sociological or economic or cultural considerations. But the reference to the existence of such a nexus is merely a guide. At the end of the day, an objective assessment of the facts of a particular case should leave the Court with the impression that a plaintiff has received harsh, unreasonable or unfair treatment in the hands of the defendant.

The third ingredient of the wrong is damage. One who claims to have suffered unfair discrimination in the hands of another cannot succeed unless he is able to demonstrate that he has suffered some injury recognised by law. The injury

may take the form of pecuniary loss. Or it may be non-pecuniary, such as injury to reputation or to property or to livelihood. So long as there is some injury which the law recognises, the third requirement is met.

Having identified the wrong and its elements, it now becomes necessary to determine its parameters. We may, we think, safely begin with the proposition that any discrimination that is sanctioned by the Federal Constitution is beyond challenge. For, the supreme law has, after propounding the doctrine of equality in Art. 8(1), gone on to carve out exceptions to it. Any discrimination that falls within these exceptions is therefore not actionable.

Next, it may be safely said that the wrong of unfair discrimination pervades both private and public law, although the remedy that may be obtained in each sphere may differ. For instance, an employee in the public service may, upon proof of unfair discrimination, obtain a declaration and an order of specific enforcement that has the effect of terminating the discrimination, for example, by directing that the particular plaintiff be promoted, or by quashing an order of demotion. We make it clear that the instances we have mentioned are mere illustrations and that the remedy in each case must be moulded to fit its own circumstances. In private law, on the other hand, proof of unfair discrimination will usually be capable of being remedied by an award of damages, the measure of which will vary according to the injury consequent upon the wrong.

Third and last, unfair discrimination in the context of public law proceedings may be justified in the public interest or on grounds of national security. Even if all the ingredients of the wrong are present, considerations of public interest or national security may render a claim for unfair discrimination non-justiciable. By way of illustration two persons may be involved in certain activity which the Executive may consider to be contrary to national security. It may order the detention of one but not the other. Such an exercise of power, although *prima facie* discriminatory, is not actionable.

With the foregoing matters in mind, we now turn to consider whether the appellant have made out a case of unfair discrimination.

The grouse of the appellant is basically that they are dissatisfied with the conferment of only the powers of auxiliary police constables and not that of auxiliary police sergeants because the rank of constable is not of the same standing with the posts they are holding and not in line with their counterparts at the Klang Port Authority who had been conferred the powers of auxiliary police sergeants. According to the appellant, the respondent had in 1981 created a new post called junior security assistants in salary scale grade D19-1 also conferred with the powers of auxiliary police constables. Then, in

line with the revised scheme of the Public Services Department effective from 1 November 1982, this new group was placed in the scheme for security assistants time scale in salary scale grade D-11 and conferred the powers of auxiliary police constables. The new group carried out the same duties with the appellant although the pay of the appellant was higher.

In 1982, 46 of the 171 security assistants in the respondent were conferred the powers of auxiliary police sergeants. These 46 became the supervisors of the appellant. The appellant contends this was an act of discrimination on the part of the respondent towards the appellant. They consequently protested to the Public Services Department on the basis that their lower standing stood in the way of their promotional chances.

By letter dated 8 October 1983, the Public Services Department had informed the appellant that the Department had directed the respondent "to comply with all the terms and conditions of the promotions of the security assistants time scale to security assistants super scale as stated in the service scheme for security assistants approved by the Department There was, however, no mention of conferring the appellant the powers of auxiliary police sergeants.

The facts on the whole are not actually in dispute and to get a proper perspective of the problem, it is pertinent to start from the meeting held on 6 September 1969 which was attended by the police, the Ministry of Transport and the respondent. That meeting was the result of the receipt of several complaints from the Shipowners Association that pilferage was rampant in the Penang Port and the intention was to reorganise the respondent's security force and to confer them police powers so that it would become more effective. The police were at that stage prepared to confer auxiliary police powers to the respondent's security assistant's provided they ceased to be members of any trade union.

It is also relevant to refer to the minutes of a meeting held on 14 June 1971 at the police headquarters in Kuala Lumpur where it is stated that as regards the appointment of 112 security assistants in the respondent as auxiliary police sergeants as at Port Swettenham (now the Klang Port Authority), this has not been agreed to as the, conditions were different in that other port and until they had acquired enough experience and expertise to carry out investigations, consideration would not be given to promote them from auxiliary police constables to auxiliary police sergeants.

Before 1975, all security assistants in the various port authorities in the country were employed under respective salary schemes. Under the *Harun Report* in 1975, all personnel who had been employed as security assistants in the said ports were placed under salary scale C16-7. However, the security

assistants in the Klang Port Authority held the rank of auxiliary police sergeants while those in the respondent were only conferred the powers of auxiliary police constables.

In 1977, pursuant to the Cabinet Committee on salary revision, the salary scheme for security assistants was changed to C-16. By letter dated 6 May 1977, the Public Services Department informed all concerned that the said grade C-16 had been changed to C-11. By the respondent's service scheme circular for security assistants dated l February 1984, C-11 is for those in time scale, C3 for those in the senior scale and Cl for those in super scale. It must be emphasised here that the respondent uses the salary scheme of the Public Services Department as the basis of its salary and promotions but it is actually only a civilian scheme and does not cater to the auxiliary police ranks conferred.

This is definitely relevant in the light of the fact that in 1981, the respondent had wanted to introduce a chain of command in its security force and had proposed a system of ranks to the Inspector-General of Police who had only approved 46 posts to be conferred the rank of auxiliary police sergeants.

The respondent accordingly made the offer to all their security assistants who had duly acknowledged receipt of the offer. The appellant did not apply and in this appeal, their learned Counsel insists that this is because they are of the view they need not as it is a matter of right for them to be conferred the higher auxiliary police rank. Eventually, 46 of their colleagues who did respond to the offer were conferred the rank of auxiliary police sergeants on 11 May 1982. Apart from responding to the offer, those who were conferred the higher auxiliary rank were not required to sit for any examination or undergo any tests.

It is relevant to take into consideration that although all security assistants in the respondent and in the Klang Port Authority were given auxiliary police rank, the police had decided, as confirmed by the minutes of the meeting held on 14 June 1971 at their headquarters in Kuala Lumpur that those in the respondent were to be conferred the tank of auxiliary police constable while those in the Klang Port Authority were to be conferred the rank of auxiliary police sergeant. This was because the qualification for entry was Sijil Rendah Pelajaran (Lower Certificate of Education) for the respondent but the higher Sijil Pelajaran Malaysia (Malaysian Certificate of Education) for the Klang Port Authority.

From 1971 to 1975, all the security assistants in the respondent were conferred the rank of auxiliary police constable and no one had complained. The only thing was that there were three stripes on the epaulette of their uniforms which

were similar to that worn in the Klang Port Authority. After 1977, the post of junior security assistant was created in the Klang Port Authority with the aim of employing the services of personnel with the powers of auxiliary police constable and possessing the Sijil Rendah Pelajaran qualification because the security assistants they were already employing held the rank of auxiliary police sergeant as they were holders of the Sijil Pelajaran Malaysia qualification. This was approved by the Public Services Department. When the respondent wanted to increase their security force, they were forced to follow the same scheme with junior security assistants possessing the Sijil Rendah Pelajaran qualification placed in salary scale D-11.

In 1981, with the need to create a more organised chain of command, the respondent applied to the Inspector-General Police to designate the ranks for their security assistants letter dated 13 February 1991, the Inspector-General of Police through its Commanding Officer for the junior posts approved 43 security assistants time scale grade C-11 to be designated as auxiliary police sergeants, 2 security assistants senior scale grade C-3 to be designated as auxiliary police sergeants majors and 1 security assistant super scale grade C-1 to he designated as auxiliary police sub-inspector. Hence the open letter from the respondent to all the security assistants to apply for the 46 posts.

It is not, therefore, within the jurisdiction of the respondent to decide on the conferment of the auxiliary police rank on their security assistants The scheme of service which they had adopted for their security force is a civilian scheme and has nothing to do with the problem in question. The decision on the number and the category entitled to be conferred with a particular auxiliary police rank is the decision of the Inspector-General of Police or the Commanding Officer under the Police Act 1967.

The result of this is that security assistants in the respondent have ended up holding different auxiliary police ranks namely that of constable, sergeant, sergeant major and sub-inspector although they are in the same salary scale and possess the same qualifications. Thus a security assistant employed by the respondent cannot simply expect to be automatically conferred by the respondent with an auxiliary police rank higher or other than the one actually conferred upon him. The auxiliary police rank is a privilege and not a right and is in the sole discretion of the Inspector-General of Police or the Commanding Officer not the respondent. In our view, the respondent had acted fairly, properly and lawfully in inviting all the security assistants to apply for the higher auxiliary police rank and those who did not apply namely the appellant surely cannot expect to be conferred what they did not apply for.

As for the special allowance of RM40 a month granted to the security assistants conferred the power of auxiliary police sergeant which had been backdated to 11 May 1982, the date they were conferred the higher auxiliary police rank, this was the special allowance for that higher rank prescribed by the Minister under s. 49A of the Police Act 1967. As for the higher housing allowance of RM138 per month compared to the appellant's RM85 a month which had been backdated to 1 September 1991, this is in line with service circular no. 10 of 1980.

Having considered the affidavits, arguments and authorities, we are of the unanimous view that the appellant is not time barred because the act, neglect or default complained of is still continuing, that it is quite proper in the present circumstances to consider a point of law where the parties had proceeded in the Court below upon an erroneous admission of the law which did not bind us, and that on the facts of this case, there is no discrimination by the respondent against the appellant. It is not in the respondent's power to confer the auxiliary police ranks or the special allowances or housing allowances in respect thereof. Things would certainly be different if they had not invited the appellant to apply for the higher auxiliary police rank which would have been a clear case of discrimination. In the event we would dismiss the appeal with costs and order the deposit to be paid to the respondent to account for their taxed costs.

*Reported by Anne Khoo*